No. 2402.

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GUST FONDAHN, *Appellant,* vs. SCHOONER "C. S. HOLMES," her tackle, apparel and furniture, *Appellee.*	No. 2402

BRIEF OF APPELLEE

RICHARD A. BALLINGER,
ALFRED BATTLE,
ROBERT A. HULBERT,
BRUCE C. SHORTS,
Proctors for Appellee.

901-7 Alaska Building,
Seattle, Washington.

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within the admiralty and maritime jurisdiction, as follows, to-wit:

(1) An action *in rem* by libellant, a seaman, to recover damages for personal injuries sustained by him at sea, aboard a seaworthy vessel;

(2) An action *in rem* by libellant, a seaman, to recover damages for an alleged breach of the owner's duty, under the maritime law, to furnish the seaman injured aboard a seaworthy vessel at sea, with proper medical care;

(3) An action *in rem* by libellant, a seaman, to recover wages;

(4) An action *in rem* by libellant, a seaman, to recover money paid by him for medical treatment of personal injuries sustained by him aboard a seaworthy vessel at sea.

To the first purported cause of action appellee (claimant) filed exceptions as follows:

> "To all such allegations in said amended libel as are allegations of facts purporting to constitute such first purported cause of action, for the reason that such a cause is not an admiralty and maritime cause of action, and is not within the jurisdiction of this honorable court, and for the reason that said amended libel does not allege facts sufficient to constitute such cause of action."

To the second purported cause of action appellee filed exceptions as follows:

> "To all such allegations in said amended libel as are allegations of facts purporting to constitute such second purported cause of action, on the ground that such amended libel does not allege facts sufficient to constitute such a cause of action."

These exceptions were sustained and appellant assigns as error, first, the action of the court in sustaining said exception to said first purported cause of action, and second, the action of the court in sustaining said exception to said second purported cause of action.

The allegations of the amended libel upon which appellant relies as setting forth facts sufficient to constitute said first and second causes of action, are set forth at length on pages 2, 3, 4 and 5 of appellant's brief.

ARGUMENT.

(a) First assignment of error. Appellant in his brief makes no argument whatsoever and cites no authorities in support of his first assignment of error; hence we may assume he has abandoned his desire to press this point further. We feel that the opinion of Judge Neterer sustaining appellee's

exception to said purported first cause of action so clearly sets forth the law applicable to the facts alleged in said first purported cause of action and so fully cites and reviews the authorities establishing such law, that we can add nothing by way of argument in support of that opinion. We might add in the words of this court, quoted from the case of *Olson vs. Oregon Coal & Navigation Co.,* 104 Fed. 574:

> "There is no averment in the libel tending to show that the ship was not properly equipped with all necessary and appropriate appliances or that she was not properly manned or not entirely seaworthy. Or that there was any neglect on the part of the defendant in the selection of the officers or crew of the ship."

Appellant's charge of negligence against appellee is:

> "Libellant inquired of the captain how the wire was on the bow, and he was told by the captain that the wire was slack and that everything was all right, and to let go, and libellant let go. * * * The wire was tight and sprang back and hit libellant."

Assuming the captain was negligent, as charged, and that appellant was injured thereby as charged, still it was no more than negligence in the ordinary navigation of the ship, in which common employment all of the members of the ship's company were

engaged; and as said by Judge Neterer in his opinion, "For such negligence of any member of the crew, whether seaman or captain, the owner is not liable, and the vessel cannot be proceeded against *in rem.*"

The Osceola, 189 U. S. 158; 47 L. Ed. 760;

Olson vs. Oregon Coal & Nav. Co., 104 Fed. 574;

The Queen, 40 Fed. 694;

Quinn vs. Lighterage Co., 23 Fed. 363;

The Governor Ames, 55 Fed. 327;

The Bunker Hill, 198 Fed. 587;

The City of Alexandria, 17 Fed. 390;

The C. S. Holmes, filed Dec. 31, 1913, 209 Fed. 970.

(b) Second assignment of error. In sustaining the exception of appellee (claimant) to the original libel, Judge Neterer said:

> "It is the duty of the owner to furnish an injured seaman with proper medical care, and the master represents the owner with respect to this duty, and the owner is liable for the negligence of the master in that regard.
>
> "Where the master employs a physician, is the owner liable in all events for the negligence of that physician, or is he liable only where the master fails to exercise reasonable care in selecting the physician? No case in admiralty which decides that question has been found; it must be determined upon reason and analogy,

having regard to the nature and character of the duty imposed.

" 'It is well settled that a master has performed his entire duty in respect to furnishing medical attention to a servant injured while at work, when he employs a person of ordinary competency and skill in the profession; and having done so, he cannot be made liable for the carelessless of his duties. So, too, where a hospital is maintained by a master for the sole purpose of relieving injured servants, without any intention of profit to himself, he is not liable to his servants for the malpractice of the physician employed, if ordinary care was exercised in selecting him, although the hospital is supported by the contributions of the servants.'

"*26 Cyc.,* 1082.

"The owner's duty cannot be analogous to the obligation of the employer who makes a profit in furnishing medical attendance, for the shipowner makes no profit, and is not required to keep a physician on board the vessel. The duty is one which arises out of or is governed by the circumstances of each particular case, and it is only for the negligence of the owner himself, or the owner's representatives, the master, that the vessel can be held. The master is not negligent when he exercises reasonable care in selecting and employs a regularly licensed physician, believing him to be competent, and entrusts the injured seaman to his care, in the belief that such physician will render careful and competent treatment.

"The libel does not allege that the master knew of the incompetency of the physician, or that he should have known of such incompetency and failed to exercise reasonable diligence

in selecting him. The libel alleges that the master represented to the doctor that he would be paid for his services through the marine hospital, and that three days thereafter the doctor informed libellant that the master's representations were false. There is no allegation that these representations were untrue, or that the doctor manifested any unwillingness to the master to accept such terms of employment; nor are the doctor's statements binding upon the master of the vessel. The libel also alleges that the master took libellant to Port Angeles to a private doctor when libellant had requested to be taken to Port Townsend to the marine hospital. This cannot of itself constitute negligence, since it is manifest that an injured seaman cannot in every instance have the choice of physicians, regardless of expediency or expense. The master's duty to the owner requires that he should take such matters into consideration, and while the humane duty to the seaman should have the greater weight, the master cannot be said to be negligent when he exercises reasonable diligence in employing a physician whom he believes to be competent to attend to the seaman's injuries. For all that appears in the libel the master may have believed that the libellant would receive treatment as much calculated to effect a cure from the physician in question as from the marine hospital. Where there is no negligence of the master, the physician's negligence cannot be imputed to him or to the owner, and the vessel cannot be proceeded against *in rem*."

And in sustaining the exceptions of the appellee to the said purported second cause of action set forth in the amended libel, Judge Neterer in

his opinion says:

> "In the former opinion in this case it was held that the owner is liable for the negligence of a physician employed by the captain only when the master is negligent in employing him. The duty was there held analagous to that of selecting a competent fellow servant, where the master is held liable only when he knew or should have known of the incompetency of the fellow servant.
>
> "*26 Cyc.,* 1295, 1298.
>
> "It was stated that the mere act of not going to Port Townsend to take libellant to the marine hospital would not be negligence. The question then remains whether in the employment of this particular physician there was such negligence as to charge the owner. It is nowhere alleged that the master knew of the physician's incompetence, nor are any facts alleged sufficient to charge him with knowledge. It is alleged that the master gave the physician a permit to the marine hospital, telling him that it was good for all expenses, when the captain knew that it was valueless for any other purpose than admission to the hospital. It is then alleged that 'in the presence of the captain an attempt was made by the then *unwilling* doctor to fix him up temporarily.' Only by the most liberal inference can the missing links between the representations of the master and the malpractice be supplied. It can be only by reading into the libel allegations that the *unwillingness* caused the malpractice, and that the unwillingness was caused by the falsity of the representations. The word 'unwilling,' as applied to the doctor, expresses a conclusion as to a state of mind, and no words or acts of the doctor are

alleged which manifested to the master such a state of mind. It is evident that the physician accepted the employment and undertook to minister to libellant. Even had he done so gratuitously, there rested upon him 'the same degree of care and skill and the same measure of duty' as would have rested upon him had he received compensation.

"*22 Am. & Eng. Enc. Law,* 801.

"Here he had not only the liability of his patient, but that of the owners and the vessel as well, upon which to rely.

"*The Osceola,* 189 U. S. 158;
"*The New York,* 204 Fed. 764;
"*The City of Alexandria,* 17 Fed. 390.

"A misrepresentation as to the method of payment, under such circumstances, cannot be reasonably anticipated to result in malpractice. It is not such negligence or fault as will charge the vessel. The other allegations are merely of conclusions, from which no implication of negligence is necessarily drawn, and are to be disregarded.

"*Strauss vs. Fox,* 34 S. C. R. 42;
"*Jackson vs. Chicago, Mil. & St. Paul Ry.,* filed in this Court Feb. 2, 1914."

There is no charge in the amended libel that the master, following the accident, neglected to properly put his ship about and return to port to procure medical aid for the injured seaman. On the contrary the amended libel alleges in Article III that the accident happened about 7:00 o'clock in the evening, on the high seas, a considerable distance

off Cape Flattery, and further expressly alleges in Article IV that the captain gave orders to go back to Port Angeles, where they arrived about 3:00 o'clock the following morning; and that by 7:00 o'clock the captain had taken the injured man ashore, had secured the attendance of Dr. Taylor and had placed the injured man under his care.

There is no charge in the amended libel that Dr. Taylor was not a physician and surgeon regularly licensed and practicing under the laws of the State of Washington; there is no charge that he was an incompetent physician and surgeon, or is there any charge that the captain could with reasonable investigation or inquiry, have determined anything derogatory to the personal or professional reputation of Dr. Taylor; hence it may be assumed that Dr. Taylor was a regularly licensed and practicing physician and surgeon, having a good standing and reputation as such in Port Angeles and vicinity.

The captain is not charged with neglect of duty in taking appellant to Port Angeles, rather than continuing on up the straits to Port Townsend and placing him in the hospital there, although it is charged that the captain refused the request of appellant that he be taken to Port Townsend; but we

submit that in putting into Port Angeles the master strictly complied with the duty resting upon him at the time, that is, the duty to put into the nearest port where medical assistance could be obtained, and we do not think any reasonable person would have any reason to doubt that proper medical care and treatment for one suffering from a broken arm could as well be obtained in Port Angeles as in Port Townsend.

And in determining what port he should put into, it was the duty of the master to at least consider the expense to the owners of his vessel and her cargo. We quote from the opinion of Justice Brown in the case of *"The Iroquois,"* 194 U. S. 240; 48 L. Ed. 955:

> "Each case must depend upon its own circumstances, having reference to the seriousness of the injury, the care that can be given the sailor on shipboard, the proximity of an intermediate port, the consequences of delay to the interests of the shipowner, the direction of the wind and the probability of its continuing in the same direction, and the fact whether a surgeon is likely to be found with competent skill to take charge of the case. With reference to putting into port, all that can be demanded of the master is the exercise of reasonable judgment and the ordinary acquaintance of a seaman with the geography and resources of the country. He is not absolutely bound to put into such port if the cargo be such as would be

> seriously injured by the delay. Even the claims of humanity must be weighed in a balance with the loss that would probably occur to the owners of the ship and cargo. A seafaring life is a dangerous one, accidents of this kind are peculiarly liable to occur, and the general principle of law that a person entering a dangerous employment is regarded as assuming the ordinary risks of such employment is peculiarly applicable to the case of seamen."

The captain having reasonably exercised his discretion in the premises in putting into Port Angeles, and having used reasonable care in securing a physician and surgeon to treat the injured seaman, we know of no law which imposes upon the ship liability for the neglect of the physician in treating his patient. It was held in the case of *Campbell vs. Frank Gilmore,* 43 Fed. 318:

> "Neither are they (the owners of the vessel) at all responsible for the treatment which libellant's injured leg received at the marine hospital."

In his opinion in this case, Judge Neterer says that the duty resting upon the ship and her owners to furnish medical attendance to an injured seaman is analogous to the duty of one who collects fees from his employes and undertakes to furnish medical treatment without making a profit therefrom.

In the case of *Union Pacific Ry. Co. vs. Artist,* 60 Fed. 365, Judge Sanborn, of the Eighth Circuit,

in his opinion reviews the authorities on this point, and announces the law as follows:

> "It would be a hard rule, indeed—a rule calculated to repress the charitable instincts of men,—that would compel those who have freely furnished such accommodations and services to pay for the negligence or mistakes of physicians or attendants that they had selected with reasonable care. No such rule has ever prevailed in this country. The rule is that those who furnish hospital accommodations and medical attendance, not for the purpose of making profit thereby, but out of charity, or in the course of the administration of a charitable enterprise, are not liable for the malpractice of the physicians or the negligence of the attendants they employ, but are responsible only for their own want of ordinary care in selecting them. *McDonald vs. Hospital,* 120 Mass. 432; *Insurance Patrol vs. Boyd,* 120 Pa. St. 624, 647, 15 Atl. 553; *Van Tassell vs. Hospital* (Sup.), 15 N. Y. Supp. 620, and note; *Glavin vs. Hospital,* 12 R. I. 411; *Laubheim vs. Steamship Co.,* 107 N. Y. 228, 13 N. E. 781; *Secord vs. Railway Co.,* 18 Fed. 221; *Richardson vs. Coal Co.* (Wash.), 32 Pac. 1012."

Another case which we believe strictly in point is that of *Laubheim vs. Netherland S. S. Co.,* 107 N. Y. 228, 13 N. E. 781. In that case plaintiff took passage on the S. S. "Stella," belonging to the defendant company, and during the voyage sustained personal injuries. The surgeon aboard the vessel, employed by the steamship company, took charge of

plaintiff and operated upon the injured part. Plaintiff brought suit against the company for damages for alleged improper and negligent treatment by the ship surgeon. No negligence upon the part of the company in selecting the surgeon was shown, and the action was dismissed, the court saying:

> "If, by law or by choice, the defendant was bound to provide a surgeon for its ships, its duty to the passenger was to select a reasonably competent man for that office, and it is liable only for a neglect of that duty. *Chapman vs. Railway Co.,* 55 N. Y. 579; *McDonald vs. Hospital,* 120 Mass. 432; *Secord vs. Railway Co.,* 18 Fed. Rep. 221. It is responsible solely for its own negligence, and not for that of the surgeon employed. In performing such duty, it is bound only to the exercise of reasonable care and diligence, and is not compelled to select and employ the highest skill and longest experience."

We respectfully submit that the trial court committed no error in sustaining appellee's exceptions to said first and second purported causes of action set forth in said amended libel, and that the judgment should be affirmed.

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